MICHIGAN
LAW REVIEW

VOL. XIII. MARCH, 1915 NO. 5

OBSERVATIONS ON THE LAW OF EVIDENCE.[1]

COMPLAINTS of the administration of justice have been many of late, and the law of evidence has had its full share. Our profession ought to listen to such complaints with an open mind and a temper free from prejudice or irritation; and if we are honest with ourselves we may realize that it will take an effort to attain this serene and candid intellectual atmosphere. Conservatism is a natural and proper attribute of our profession. Law, as has been finely said,[2]

> "embodies beliefs that have triumphed in the battle of ideas, and then have translated themselves into action; while there still is doubt, while opposite convictions still keep a battle front against each other, the time for law has not come; the notion destined to prevail is not yet entitled to the field,"

and our inherited common law habit of thought keeps before our minds, consciously and subconsciously, the need of reliance on the past —the value of experience in testing the soundness of principles by their practical application. But this fact should make us the more alert lest we overlook changes in the very conditions which justified the established rule[3]—lest we forget the truth expressed by the words *cessante ratione cessat ipsa lex*—lest in other words we fall into the sort of conservatism, founded on ignorance and narrowness of vision, which is marked ever by deliberation and timidity in the promotion of reform, and reserves all its aggressiveness and ingenuity for resisting the proposals of others. And our profession is skilled in depicting the awful consequence of change in the established order of things. Often this shows itself in dissenting opinions of

[1] Address before the Rhode Island Bar Association, Providence, December 7, 1914.

[2] Mr. Justice Holmes, Speech at Dinner of Harvard Law School Association, February 15, 1913.

[3] The spirit expressed by Lord Mansfield when he said: "We don't now sit here to take our rules of evidence from Siderfin or Keble" (Lowe v. Jolliffe, 1 W. Bl. 365, 366), is a tonic which our system needs, dangerous though it be when administered by an uneducated hand.

eminent judges. As we look back over the growth of our law, developing like a living thing—as it is—we often see some court taking a step which at the time seemed radical but was in fact only an advance for which the time was ripe. Such a decision is often accompanied by the dissent of some strong judge, no longer young, to whose conservative habit of mind the new adjustment is impossible. One of the characteristic features of such dissents is the convinced and powerful demonstration of the evils sure to follow from this heresy. The keystone has been struck from the arch, and the temple of justice will fall in ruins. But the temple somehow stands and a few years pass; and to a new generation the soundness of the majority opinion is so manifest that discussion becomes unnecessary, and the dissenting opinion remains only as a historical curiosity or a specimen of the forensic art.

Massachusetts furnishes an instance of this sort of thing in a somewhat different form. Her practice act was drawn by a commission of which Judge CURTIS was the leading figure, and it proved a distinguished success. It was an instance of sane and enlightened law reform for which two generations have had reason to bless its distinguished author. Among other changes it did away with interest as a disqualification of witnesses, and Judge CURTIS's observations on this subject in his report show how liberal and advanced were his views. But the commission was not prepared to let parties testify; and in this very report, written by a great lawyer, engaged in a work of innovating, and doing it in no narrow spirit, may be found an argument against accepting the testimony of parties which presents the matter so skillfully and so formidably that the direst injustice seems bound up in such a departure from the old order. So parties remained incompetent—for a few years more; but in a decade who would have dreamed of restoring the ancient ban?

Remembering, then, how often prophecies of disaster to follow upon a new thing have failed, even when made by great men with reason behind them, patience and optimism are well nigh exhausted by the dogged resistance to any change in our system which reduced to its lowest terms means nothing but the ignorant clinging of instinct to familiar forms, backed by the advocate's gift of making any position more or less plausible.

As to the law of evidence—that "neglected product of time and accident"—the argument from antecedent probability is all on the side of the attacking party. It would be strange indeed, considering its history, if it did *not* need a change. As is well known it came into existence in great part in England between 100 and 150 years ago, practices growing up on circuit, and gradually taking shape as

a body of law. Many of these rules represented the common sense of English judges of that time; others were historical survivals of practices centuries old, with roots stout and deep enough to defy all change, persisting by the force of blind custom, but reinforced, as is the way with such things, by fictitious reasons derived *ex post facto* from pseudo-historical theorizing. Apart from such survivals, however, and considering only the most modern and rational of the common law rules, think of the difference between England of 1800 and America of 1914, in social and industrial conditions, in juristic theory, even in the character of a jury trial. Mark first the change from that England to the pioneer community on this continent which after the Revolution accepted the common law of England—not without a struggle. And mark again the change from that pioneer community to our city life and complicated industrial civilization of today. Unless one retained an artless belief in the supernatural how could he expect that the same conceptions of procedure—and we must never forget that it is mere procedure we are talking about—would fit all those conditions alike, immune from the need of change?

Experience too comes quickly to reinforce the argument from antecedent probability and teach us humility. As a matter of plain common sense what is to be said for the absurdity of forbidding the holder of a contract to prove the signer's signature out of his own mouth, merely because the parties, without any legal need of doing so, took the reasonable precaution of verifying their signatures by an attesting witness? What relation to reason has it to prescribe that when the genuineness of a signature is on trial the tribunal shall be denied the aid of the kind of evidence to which a reasoning human being would first turn for light, unless by accident some of that evidence happens to have strayed on the premises for some other purpose? Such burlesques on law are gradually being abolished by statute, but how long after the last flicker of reason behind the rule went out? And may we not find others of their kind still in force?

The attack on the rules of evidence often takes the form of a demand for their total abolition. It is urged that all rules or privileges which shut out the truth should be cleared away and the light let in from every angle; that the law should cease to treat a trial as a game in which a client's welfare hangs on a lawyer's strategy, and require that it be played with all the cards on the table.

When such criticism comes from laymen, as much of it does, a lawyer naturally feels that it would be entitled to more respect if the critic understood the subject he was discussing. It is one of our professional habits of mind to recognize that the value of an opinion, either on fact or law, depends on the thoroughness with which the

ground has been explored; and tested by this standard lay opinion on our present subject cannot well be rated higher than evidence that something is wrong. A consensus of dissatisfaction among intelligent laymen as to any part of the administration of justice is smoke beneath which there is probably some fire. But so far as diagnosis or prescription are concerned, one would not wisely rely on the uninformed. And a special reason for distrusting such advice in the present instance is the misunderstanding of the rules of evidence which is so conspicuous, not only among laymen, but also among many lawyers. The layman, whether his attitude be one of indignation or only of patronising contempt, sees in them a mysterious agglomeration of rules, existing for their own sake in defiance of reason or common sense. The lawyer only too often seems to regard the law of evidence as a mysterious organon for the discovery of truth, to be treated with an element of reverence as something complete in itself, interference with any part of which would partake of sacrilege and invite alarming and unknowable consequences. These opposite views have one feature in common—the quality of *mystery* which both attribute to the subject. And it is this one point upon which (so far at least as concerns anything properly surviving, as distinguished from "the rubbish that gathers round every system of law") both are most wrong. The matter cannot be at a proper focus until the law of evidence is seen as the thing it is—"a piece of illogical, but by no means irrational, patchwork; not at all to be admired, nor easily to be found intelligible, except as a product of the jury system, as the outcome of a quantity of rulings by sagacious lawyers, while settling practical questions, in presiding over courts where ordinary, untrained citizens are acting as judges of fact. Largely irrational in any other aspect, in this point of view it is full of good sense;—a good sense, indeed, that occasionally nods, that submits too often to a mistaken application of its precedents, that is often short-sighted and ill-instructed, and that needs to be taken in hand by the jurist, and illuminated, simplified, and invigorated by a reference to general principles."[4]

This wholesale attack on the law of evidence, however, is not limited to laymen and to lawyers unfamiliar with trials. The same thing comes from very different sources. Active trial lawyers may be heard demanding the abolition of all excluding rules. Favorite illustrations are the criminal defendant's privilege of silence, the privilege of attorney and client, and the hearsay rule. These three things are grouped together and condemned alike as antiquated and immoral obstacles shutting out the light of truth.

[4] Thayer, Preliminary Treatise on Evidence, 509.

Such lighthearted and undiscriminating condemnation may perhaps be made plausible—so may anything from the lips of some people—but it does not get us far. More help is likely to come from exactly the opposite method—the careful examination of each matter by itself, in the light of its history and practical application, to see how far the reasons which justified the rule are still alive today. And without taking too much space with the first two matters—for this discussion will be confined chiefly to the third—it is easy to see how different are the questions involved.

The right of an accused person to remain silent grew from a time when the English criminal law, "the bloodiest code in Europe," as it has been called by high authority, punished with death all sorts of offences indiscriminately and denied the accused person the right to testify himself, to call witnesses in his behalf, and to be represented by counsel. It was the outcome of the Englishman's long and stubborn struggle for his rights against the oppressive use of royal authority. In the age-long effort of Justice to hold her scales even between party and party—between the state and the accused—the weights may shift from generation to generation. And when one looks about him with an open eye and compares the relative positions of the prosecutor and the defendant in England of the eighteenth century and America of the twentieth—compares also our present practices with those prevailing in all other civilized countries—observes not only the hardship suffered by the state through our extravagant protection of the accused from inquiry, but also its by-product of injustice to the accused himself in the substitution of irresponsible police inquisition for a properly guarded official examination—it is hard to escape the conviction that important changes are demanded in this part of our system if the rights of the public are to be properly safeguarded.

It is a long step from this privilege to that which protects professional communications with counsel. The difference may not always be apparent to the layman. He visualizes law as a criminal trial; and the professional privilege thus presents itself to his mind as the criminal's right to confess his crime to counsel with impunity. But a lawyer does not forget the great body of civil litigation, and the still greater mass of civil controversy which is settled without litigation. He recognizes the absolute necessity to the administration of justice that lawyers be fully informed of the facts with which they have to deal, and the difficulty in getting at those facts even when every inducement is offered to clients to disclose them. He is in a position therefore to realize the paramount social interest which demands that the law create no obstacle to such disclosure: and very

little practical experience is needed to show how sharp a deterrent would come from a rule which served notice on a client, ignorant of his rights, that he could present the facts to counsel only at the penalty of exposing to the scrutiny of the adversary everything which he said in his first confusion and uncertainty. A comparison of the discrepancies, real or supposed, between what he first said or omitted to say and his later testimony on the witness stand would furnish constant opportunities for perversion and misconstruction—to say nothing of mere blackmail—and the client's natural apprehensions on this score would increase the lawyer's difficulty, serious enough under any conditions, in thoroughly exploring the facts. Counsel, too, could not fail to be embarrassed. A rule which would tend to discourage highminded lawyers from taking written statements from their clients, and would drive them at every turn to consider what prudential restraint on communications with the clients were demanded by the latter's interest—problems which could be handled more simply by less scrupulous practitioners—is not likely to commend itself to reformers who combine experience with judgment. The simple fact is that this professional privilege, within the moderate and reasonable bounds now established, does far more good than harm, and that social interests of the first importance —interests which have nothing to do with the privilege against self-incrimination—forbid any tampering with it.

These two important parts of the law of evidence thus present different problems to the reformer. The hearsay rule, in turn, raises questions quite different from either. It excludes hearsay by a rigid and unbending rule, tempered by a series of exceptions—for of course no rational system could countenance a hearsay rule without *some* qualifications—which, so far as concerns their actual outline, are to a great extent accidental and historical. Each of these exceptions of course rests, or once rested, on reason of some sort; but the attempt to make the group, in the form in which they finally chanced to settle, fit into a scheme having any measure of theoretical consistency is an undertaking so Procrustean as to defy even the brilliant ingenuity of Professor WIGMORE. The method of the common law, very characteristic of the period of strict law during which most of the rules of evidence took their final shape, was like that by which it determined the competency of witnesses. Just as a badge of danger, such as interest or infamy, exposing the witness to suspicion was laid hold of to bar him altogether—the simple, if somewhat archaic, thought being that by ridding itself of the witness the law rid itself of the danger—so here some circumstances making in favor of a particular sort of hearsay—the special need of it,

its probable accuracy, or the mere fact that it had always been accepted in the past—was laid hold of to admit that particular sort of hearsay under all circumstances, while every other sort not bearing one of these accredited badges, no matter how reliable the speaker or how strong the circumstantial guarantee of its truthfulness, was rejected. This method, natural to the English law a hundred years ago, is not acceptable to the modern mind. It seems to us crude and primitive, and we are ready to say, with Judge HOLMES: "I do not think we need trouble ourselves with the thought that my view depends upon difference of degree. The whole law does so as soon as it is civilized. * * * and between the variations that I suppose to exist and the simple universality of the rules in the Twelve Tables or the Leges Barbarorum there lies the culture of two thousand years."[5] This course of evolution shows itself in the parallel case of the competency of witnesses. We have long since ceased to deny ourselves the advantages of interested testimony merely because it has danger; as Lord COCKBURN somewhere says, nowadays we let the evidence in and then discuss its value. Should we not adopt a like method in our treatment of hearsay provided the witness cannot be brought into court?

I should answer yes to this question; but that answer cannot be made without looking the fact squarely in the face that the departure from fixed rules of exclusion means trusting much to the trial judge's discretion. Every trial lawyer knows that there are inconveniences (to put it mildly) in having to look for his protection to the discretion of a magistrate in whom the possession of that attribute may be theoretical only, and who has at least the infirmities of temper and judgment to which mortal flesh is heir. The common law went to great lengths in protecting itself against such risks; and American law, with its profound distrust of the trial judge, has out-Heroded Herod in this particular. The statute, which is so deplorably common,[6] denying to the jury the assistance of the only trained and impartial mind in the court room in judging the facts, is only one illustration of a tendency appearing throughout our procedure. And the very reformers who clamor for the abolition of the rules of evidence are often those who are readiest to give free rein to the jury and the advocate in the conduct of trials and fetter the controlling power of the court. This is an impossible combination. Nobody with any knowledge of jury trials can rationally demand that all the testimony which anybody chooses to offer is to go in with-

[5] LeRoy Fibre Co. v. Chic. M. & St. P. Ry., 232 U. S. 340, 354.

[6] See Professor Sunderland's excellent article on The Inefficiency of the American Jury, 13 Mich. L. Rev. 302.

out excluding anything.[7] Many things must be excluded, or the trial will become an unending absurdity. The common law brought this about by giving the judge a body of absolute rules framed by trial experience; if we knock out this prop we are bound to give him a substitute; and no substitute is possible except the right and duty to use a wide discretion. It is an absolute dilemma; and the choice between discretion and fixed rule here is only one instance of the eternal compromise in drawing the line between justice according to law and justice according to the needs of the case.

An advance from the traditional treatment of the hearsay rule means, then, giving a very free hand to the trial judge. We ought to face this fact and fearlessly increase his powers. We should recognize once for all the futility of the notion that the first end of a trial is to prepare a record for an appellate court. We should keep clearly before our minds that this whole matter of evidence is mainly procedure, and that a claim of *rights* by the parties in such a field is to be accepted with caution. Many of the defects in our procedure can be traced to this error of treating supposed rights of parties concerning the rules of evidence on the analogy of property rights, without considering the nature and purpose of the rule —whether it aims to protect an interest of the party himself, or of some third person, or the prompt and orderly administration of justice in general. Sometimes, no doubt, real rights of the party are concerned, as in the case of professional privilege. But for the most part it is only procedure; and simplicity and flexibility, important enough in any question of procedure, become doubly important in a matter so delicate and varied as the guidance of a trial before an untrained tribunal. In such a proceeding everything that hampers the administrative freedom of the trial judge is to be regarded with suspicion. It is easy to forget how much the work of the trial judge consists of mere administration. Consider for a moment the difference between trial judges. The way in which one can keep a trial in hand, make it march, and bring it smoothly and swiftly to a just issue without confusion of the jury or friction with counsel, when compared with the slow, dead and muddled course

[7] Illustrations may be found in Scotland of the effect of the jury system in driving courts to adopt excluding rules of evidence even when they are not bound by the English rules. In Madeleine Smith's case a diary of the deceased which an English judge might have found himself forced regretfully to exclude by the hearsay rule was excluded on the ground that admitting it "might relax the sacred rules of evidence to an extent that the mind could hardly contemplate." (Trial of Madeleine Smith, Notable Scottish Trials, p. 130.) Just what these "sacred rules" were is not quite clear. Kirkpatrick's Digest of the Scottish Law of Evidence, p. 22. Erskine, Principles of the Law of Scotland, 21st ed. p. 683. Anderson, Criminal Law of Scotland, 1892, pp. 241-50. Berkeley Peerage Case, 4 Camp. 401, 415.

of proceeding before a colleague, makes a contrast almost magical. Often, too, there was nothing in the previous career of either man to foreshadow this difference. The success of the one as a trial judge may be almost as sharp a surprise to the bar as the failure of the other. This probably means that when we think of a judge our mental vision is fixed on merely *judicial* qualities, and we overlook the extent to which he is an administrator. And hard and fast rules of procedure, while they may hamper a good administrator, cannot turn a bad administrator into a good one.

Mr. SALMOND, himself a trial lawyer as well as a jurist, put the matter well when he said:[8]

> "No unprejudiced observer can be blind to the excessive credit and importance attached in judicial procedure to the minutiae of the law of evidence. This is one of the last refuges of legal formalism. Nowhere is the contrast more striking between the law's confidence in itself and its distrust of the judicial intelligence. The fault is to be remedied not by the abolition of all rules for the measurement of evidential value, but by their reduction from the position of rigid and peremptory to that of flexible and conditional rules. Most of them have their source in good sense and practical experience, and they are profitable for the guidance of individual discretion, though mischievous as substitutes for it."

And if this is true even of English law, how much truer must it be of our American treatment of the rules of evidence, which excites the wonder of English observers by a rigidity and technical insistence on detail compared with which the English system is flexibility itself.[9]

This view, that in a modern system the rules of evidence should serve as guiding principles and not as peremptory rules, finds confirmation in the modern history of the subject. It is instructive to observe to what an extent a flexible and rational method has worked itself out, by one device or another, even where in form the definite outline of the rule is still preserved. If one rule of evidence after another be examined we find in each the same pressure of the needs of civilized procedure making itself felt and finding a channel through the shell of formalism like the working of a natural force. Consider for a moment the various rules and notice how far this is true.

The opinion rule scarcely deserves longer the name of *rule*, having now established itself on a basis of mere convenience and reason without any strain on our judicial machinery.

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[8] Jurisprudence (3rd ed.) 458.

[9] Compare Leaming, A Philadelphia Lawyer in the London Courts, 102-104.

A generation or so ago we should have been told that there was a rule of evidence excluding transactions not in issue—*res inter alios acta*—subject to certain exceptions. Today it is the simple fact as a matter of substance, whether in form a court recognizes it or not, that the proof of facts having a merely collateral bearing on the issue as circumstantial evidence—the customs of others, the working of other machines, accidents to other persons, and the like—depends on mere differences of degree, with no test but the demands of the particular case. In each instance it is a question of making a connection; and whether you will be permitted to do this depends on the closeness of the matter to the issue and the importance of the evidence—on computing the factors pro and con, striking a balance, and deciding whether the evidence is worth the price paid for it. In other words, here again a supposed rule of evidence has virtually disappeared and become a matter of discretion. And it must not be forgotten that this last sort of question makes up the bulk of the rulings of a trial judge on points of evidence—that is to say, on points of evidence which have any relation at all to the law of evidence, and are not really questions of substantive right presenting themselves in the form of rulings on evidence. Already, therefore, it is true as to this great body of rulings that the determining considerations—how close is the evidence to this case and how objectionable are the collateral issues involved in making the connection—are questions of fact, of degree, of atmosphere of the court room, concerning which the trial judge is hampered by no fixed rule and on which a law court with a paper record before it is rarely in a position to reverse him. If you wish to verify this ask any able and candid judge of some experience how far he goes by the books in ruling on questions of evidence. His answer will confirm what Mr. CHOATE once said to me in speaking of my father's TREATISE ON EVIDENCE, then recently published. He said, "Tell your father it is a good book, but it is a pity he did not publish it while there was still such a thing in existence as the law of evidence."

Or take the character rule. The courts, with different degrees of strictness, will lay it down as a settled rule (subject of course to the recognized exception in criminal cases) that a man's conduct on one occasion is no evidence of his conduct on another. But every court will recognize that there are matters of habit, strictly so-called, practices instinctive and involuntary, which are unquestionably admissible. Handwriting is a simple and extreme instance; and other things harder to distinguish from character of the objectionable sort, but still admissible, can be easily imagined. Drawing the line between character and habit leaves this rule in such a shape that its

outline is really flexible; with some courts indeed, it may be doubted how much remains of the rule even as a guiding principle.

Or take the best evidence rule in the strict sense, all of it that remains as a *rule,* that referring to documents. This sensible requirement seems at first sight to be a rule of the strictest sort. Yet courts will often lay it down that it does not apply to "collateral" matters; and at the same time the definition of collateralness is left in such a state of convenient vagueness that there is little to prevent the court from relaxing the rule about as it wishes whenever it seems to press unreasonably.

Take finally the hearsay rule. This rule with its traditional exceptions typifies the arbitrary common law reliance on specified tests of admissibility; and critics of our system have delighted in the easy task of showing the injustice which it may work in a particular case by excluding some piece of evidence, obviously necessary and reliable, which does not fall within the more or less accidental outlines of some exception. Yet even here more than one safety valve has automatically established itself. The use of declarations as evidence of a mental state, itself to be used in turn as circumstantial evidence of fact asserted, furnished attractive opportunities for extensions which if carried to their logical extreme would leave the hearsay rule scarcely discoverable. And a substantial step may be made in this direction by a soberer and less audacious method through the familiar exception touching declarations of deceased persons against pecuniary interest. In applying this exception the question at once arises how directly must the declaration bear on pecuniary interest to make it admissible. It can easily be shown that this is a question of degree, making hard and fast lines impossible; and by applying the test liberally and taking advantage of the established rule that if part of the declaration is against interest it brings in connected matters with it, a court may do much toward letting in such hearsay as it pleases, and yet the traditional doctrine "appear to moult no feather." And if all else fail, there is always a refuge in the *res gestae.* The real use of this phrase for generations has been to conceal beneath its convenient confusion of thought a desired result for which articulate reasons were lacking.

These illustrations, drawn at random, might easily be multiplied to show the constant tendency of the law to work itself into a rational and flexible shape in spite of the limitations set by established rules. But it should not be compelled to reach its results in these indirect ways. What is the right method? It is often urged, and plausibly, that the matter can best be handled by judges; that just as this was judge-made law to begin with, so it can grow best at

the hands of judges, and that they are better equipped than legislators to wrestle with its problems. Such views have shown themselves in a recent decision[10] overruling previous cases and declaring dying declarations admissible in all cases, civil and criminal alike. The spirit behind such a decision may be commendable, but the method is unfortunate; such piecemeal attempts at rationalizing disconnected and more or less incongruous rules make for confusion worse confounded. The courts should recognize that legislation is no less needed here to set them free from settled rules than it was with the competency of witnesses; and until the legislature acts they will not help matters by doing violence to precedent.

Just what form legislation should take is a question of difficulty, calling for sanity, judgment and experience in its solution. It should proceed on broad and simple lines, and within those lines it should leave the judges a free hand to work out their results by rules of court. Beyond removing fettering restrictions and laying down the broad outlines of a new system it is work for the judiciary rather than the legislative.

Among possible methods that adopted by Massachusetts is worthy of consideration. There a statute[11] provides that

> "A declaration of a deceased person shall not be inadmissible in evidence as hearsay if the court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant."

While this statute by no means takes the full place of the hearsay exceptions, even in civil cases, and perhaps has no application to criminal cases, it makes a great inroad into the hearsay rule, and its method can easily be pushed further so as to cover cases where other causes than death make it impossible to secure the testimony of the witness at first hand. It offers substantial protection against error and fraud not only by limiting the evidence to statements made on personal knowledge and before the beginning of the suit, but by the further requirement, based on the familiar duty of the court to determine questions of fact incidental to the admission of evidence, that the judge must decide as a matter of fact that these conditions were satisfied. This, it will be observed, necessarily involves a finding by the judge that the witness who comes to report the declaration is telling the truth; for otherwise it will be impossible for him to make the required finding as to the date and circumstances of the

[10] Thurston v. Fritz, 91 Kans. 468.

[11] Massachusetts Revised Laws, ch. 175, § 66, enacted in 1898. For the history of this statute, see Thayer's Legal Essays, 303.

declaration. Thus no party can suffer injustice from such testimony unless his adversary succeeds in misleading *both judge and jury.*

This statute has apparently worked well in practice, although there has been some complaint, especially from counsel representing defendants in accident cases, of the ease with which such declarations may be manufactured. If the statute be deemed too radical, and it is thought that reform should begin by a shorter step, it seems abundantly clear that such a statute would be sound if limited to *written* declarations. A distinction between written and oral testimony may well deserve more attention from modern reformers of the law of evidence than it received at common law. In dealing with hearsay the suspicion of the common law as to the unreliability of hearsay statements actually made seems at times out of all proportion to its willingness to accept the testimony of the witness who testifies that they *were* made. It attributes such an importance to cross-examination that it is ready to assume the trustworthiness of the witness to the fact of the declaration simply because he can be cross-examined, and the untrustworthiness of the declarant simply because he can *not.* In real life, however, the ease of manufacturing declarations and putting them into the mouth of the dead is one of the most serious elements in the problem. This element largely disappears in the case of written declarations; for the danger of forgery is relatively slight as compared with that of mistake or dishonesty concerning oral communications. The operation of our present rule to keep out statements in old letters or depositions of persons now dead in suits between third parties is indefensible.

In such discussions as this, however, one must not be tempted to overestimate what rules of law can do. No system or body of rules can run itself. With a good judge the worst system will work well; with a poor one the best system will work badly. In procedure and administration the vital thing is the quality of the magistrate; and by this token Rhode Island has much reason for pride in her past and hope for her future. I believe it is no accident that you have escaped the belittling restrictions on the powers of the trial judge from which most states suffer; for ever since the first famous attempt at judicial recall in Rhode Island this community has had the means of knowing where to repose its trust in the administration of justice. Throughout its history it has been easy to recognize on your Bench the lineal descendants of the judges who stood up in *Trevett* v. *Weeden* in the face of popular clamor and declared that they were "accountable only to God (under the terms of their oath of office) and to their own consciences." EZRA RIPLEY THAYER.

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